Santhi a/p Vathian (joint administrator for the estate and dependant of Thanabalan a/l Subramaniam, deceased) & Anor v L/Kpl Nadzir Afiq bin Abdul Malik & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-21NCVC-51–04 OF 2021
CHOO KAH SING J
12 MAY 2022

Tort — Negligence — Death whilst in police custody — Next-of-kin of man who died 19 days after being detained by police under security law sued for dependency and estate claims on ground detaining authorities had breached their duty of care to him — Deceased was found to have serious stage of leptospiral infection that precipitated his death — Whether defendants were negligent in not according deceased prompt medical attention — Whether plaintiffs had proven on balance of probabilities that deceased contracted the leptospiral infection whilst he was in police custody and due to the conditions of his cell — Whether plaintiffs had proven that any action or inaction on defendants' part was directly responsible for deceased's death — Whether plaintiffs' claim for misfeasance in public office against defendants was unsustainable

The first and second plaintiffs were, respectively, the wife and father-in-law of one Thanabalan Subramaniam ('the deceased') who died while he was in police custody after being arrested under the Security Offences and Special Measures Act 2012 ('the SOSMA'). The deceased died on the 19th day of his detention at the Shah Alam police headquarters detention centre shortly after he, and two other detainees (Logeswaran and Edward John), complained at the same time that they were not feeling well. A decision was taken to send Logeswaran and Edward John to hospital first. The deceased, meanwhile, fainted in his cell. By the time he was taken to hospital, he had died. The attending doctor ('Dr Avinash') attempted to resuscitate the deceased, but without success. A post mortem the following day revealed that apart from underlying cardiac conditions that the deceased had (ie, myocardial bridging and coronary atherosclerosis), he was suffering from leptospiral infection which had spread to his kidney and lungs. The forensic expert concluded that the infection coupled with the cardiac conditions had so overwhelmed the heart that it stopped beating. Vide the instant action, the first plaintiff brought a dependency claim, and the second plaintiff an estate claim, under ss 7 and 8, respectively, of the Civil Law Act 1956 against the defendants premised upon the negligence and misfeasance in public office of the first to the 12th defendants. The plaintiffs, who were the joint administrators of the deceased's estate, alleged that the defendants had breached their duty to ensure that so

long as the deceased was in their custody, his health, safety and well-being would not be compromised and that he would be given prompt medical attention if he fell ill. The plaintiffs said the defendants' breach of that duty of care caused or contributed to the deceased's death. In an attempt to prove that the deceased had contracted the leptospiral infection whilst he was in police custody, the plaintiffs relied upon findings of facts made by a coroner who had carried out an inquest into the deceased's death. The coroner had found 'on balance of probabilities' that the deceased's cell was filthy and must have been visited by rats carrying the leptospirosis bacteria and that the deceased must have contracted the disease when he drank water from the toilet bowl in his cell (because there was no other drinking water available). The coroner also found that the deceased's life might have been saved if the police had not delayed taking him to hospital for treatment.

Held, dismissing the plaintiffs' claims:

(1) The plaintiffs had not discharged their burden of proving on balance of probabilities that the defendants had breached their duty in the tort of negligence or that the breach led to the death of the deceased. The causal link between the actions/inactions of the respective defendants and the death of the deceased was not proven. The claim for misfeasance in public office against the defendants was also not proven on balance of probabilities (see para 61).

(2) Although the defendants owed the deceased a duty of care, there was no evidence that they had breached that duty as the plaintiffs failed to prove that the deceased contracted the leptospiral infection at the detention centre and that his life could have been saved if he had been sent to the hospital earlier (see para 57).

(3) An inquest proceeding was not a trial and the coroner's findings in the inquest proceedings could not be treated as facts that had been proven in the plaintiffs' case without calling witnesses to prove those facts. The coroner's findings that the deceased's cell was filthy and was visited by rats which could have contaminated the water in the toilet bowl which the deceased must have drank in order to contract the leptospiral infection were all conjectures as no evidence was adduced before the coroner for her to have come to those findings. It was wrong in law for the coroner to have made findings of facts based on speculation. A coroner's verdict was not determined by probabilities but by established facts. A coroner was bound by evidence and could only find facts proven by evidence, not guesswork (see paras 25–30 & 35).

(4) The medical evidence could not confirm the source of the deceased's leptospiral infection and showed that he must have been suffering from the disease for about ten to 30 days since the infection had spread to his lungs and kidney. It was thus probable that he might have contracted the

A disease before he was arrested. The plaintiffs did not adduce any evidence to rule out this probability. Nor did they call the doctor who had treated Logeswaran and Edward John to testify in order to show whether their ill-health had any link to the leptospiral infection. No evidence was adduced to show when in point of time the deceased had contracted the B infection, whether the water in the toilet bowl of the cell was infected and whether the deceased had consumed that water. As there was no cogent and independent evidence to establish that the deceased contracted the infection whilst he was in the lock-up, the plaintiffs had failed to prove that the deceased contracted the disease whilst he was under the C defendants' custody (see paras 31–34 & 36–37).

(5) On the peculiar facts of this case, neither the seventh ('D7') or the eighth defendants could be faulted for deciding to send Logeswaran and Edward John first to the hospital because, according to D7, their condition D seemed to be worse than the deceased's. Given that the leptospiral infection had affected the deceased's lungs and kidney, no evidence was tendered to show how much earlier in time the deceased should have been brought to hospital in order that his life could have been saved. Dr Avinash recorded that when the deceased arrived at the hospital at E 8.35pm, he was already dead. That meant the death must have occurred between that time and when he was last seen alive at about 7.45pm (when D7 arrived at the detention centre and took Logeswaran and Edward John to hospital). If the deceased had been sent to the hospital first before Logeswaran and Edward John, could he have survived? No medical F opinion was offered to this court to make an informed assessment on this issue (see paras 41–43 & 46–47).

(6) Taking into account the underlying conditions that the deceased had (myocardial bridging and coronary atherosclerosis), and in the absence of a comprehensive medical expert opinion, it was not possible for this court G to make a finding, based on balance of probabilities, that the deceased's life could have been saved if he had been taken to hospital earlier. There was also no evidence to suggest that the deceased had complained of being ill for several days and that he was not given medical attention by H the police at the detention centre. The court was therefore unable to make a finding that the defendants had committed a breach of their duty to the deceased and that such breach had caused his death (see paras 51–53).

(7) There was no evidence in the plaintiff's case to support the claim for I misfeasance in public office. It was not shown that the defendants had committed any illegal wrong-doing; there was no evidence of malice, no evidence to suggest the defendants had acted with improper or ulterior motive or that they had concealed, distorted or destroyed any evidence before the court. The mere fact that the deceased died while he was in the

custody of the defendants by itself could not immediately give rise to a claim for misfeasance in public office. Hence, the claim under this head was totally unsustainable (see para 60).

[Bahasa Malaysia summary

Plaintif pertama dan kedua, masing-masing, isteri dan bapa mentua kepada seorang Thanabalan Subramaniam ('si mati') yang meninggal dunia semasa beliau dalam tahanan polis selepas ditangkap di bawah Akta Kesalahan Keselamatan dan Langkah-Langkah Khas 2012 ('SOSMA'). Si mati meninggal dunia pada hari ke-19 dalam tahanan di pusat tahanan ibu pejabat polis Shah Alam sejurus selepas beliau, dan dua tahanan lain (Logeswaran dan Edward John), mengadu pada masa yang sama bahawa mereka tidak sihat. Keputusan telah diambil untuk menghantar Logeswaran dan Edward John ke hospital terlebih dahulu. Si mati pula pengsan di dalam selnya. Sejurus selepas beliau dibawa ke hospital, beliau telah meninggal dunia. Doktor yang merawat ('Dr Avinash') cuba menghidupkan semula si mati, tetapi tidak berjaya. Bedah siasat pada hari berikutnya mendedahkan bahawa selain daripada keadaan jantung si mati (iaitu, sambungan miokardium dan aterosklerosis koronari), beliau mengalami jangkitan leptospiral yang telah merebak ke buah pinggang dan paru-parunya. Pakar forensik menyimpulkan bahawa jangkitan tersebut ditambah dengan keadaan jantung telah membebani jantung sehingga berhenti berdenyut. Melalui tindakan semasa, plaintif pertama membawa tuntutan tanggungan, dan plaintif kedua tuntutan harta pusaka, di bawah ss 7 dan 8, masing-masing, Akta Undang-Undang Sivil 1956 terhadap defendan berdasarkan kecuaian dan penyelewengan dalam jawatan awam defendan pertama hingga defendan ke-12. Plaintif, yang merupakan pentadbir bersama harta pusaka si mati, mendakwa bahawa defendan telah melanggar kewajipan mereka untuk memastikan bahawa selagi si mati berada dalam jagaan mereka, kesihatan, keselamatan dan kesejahteraannya tidak akan terjejas dan bahawa beliau akan diberi rawatan perubatan segera sekiranya beliau jatuh sakit. Plaintif berkata pelanggaran defendan terhadap kewajipan penjagaan tersebut menyebabkan atau menyumbang kepada kematian si mati. Dalam percubaan untuk membuktikan bahawa si mati telah dijangkiti jangkitan leptospiral semasa beliau dalam tahanan polis, plaintif bergantung kepada dapatan fakta yang dibuat oleh koroner yang telah menjalankan inkues terhadap kematian si mati. Koroner telah mendapati 'pada imbangan kebarangkalian' bahawa sel si mati adalah kotor dan mesti dilawati oleh tikus yang membawa bakteria leptospirosis dan si mati pasti dijangkiti penyakit tersebut apabila beliau minum air dari mangkuk tandas di selnya (kerana tidak ada air minuman lain yang tersedia). Koroner juga mendapati nyawa si mati mungkin terselamat sekiranya polis tidak berlengah-lengah membawanya ke hospital untuk rawatan.

Diputuskan, menolak tuntutan plaintif:

(1) Plaintif tidak melepaskan beban mereka untuk membuktikan berdasarkan imbangan kebarangkalian bahawa defendan telah melanggar kewajipan mereka dalam tort kecuaian atau bahawa pelanggaran tersebut membawa kepada kematian si mati. Hubungan sebab akibat antara tindakan/ketidaktindakan setiap defendan dengan kematian si mati tidak dibuktikan. Tuntutan salah guna dalam jawatan awam terhadap defendan juga tidak dibuktikan berdasarkan imbangan kebarangkalian (lihat perenggan 61).

(2) Walaupun defendan mempunyai kewajipan menjaga si mati, tiada bukti bahawa mereka telah melanggar kewajipan tersebut kerana plaintif gagal membuktikan bahawa si mati dijangkiti jangkitan leptospira di pusat tahanan dan nyawanya boleh diselamatkan jika beliau telah dihantar ke hospital lebih awal (lihat perenggan 57).

(3) Prosiding inkues bukanlah perbicaraan dan dapatan koroner dalam prosiding inkues tidak boleh dianggap sebagai fakta yang telah dibuktikan dalam kes plaintif tanpa memanggil saksi untuk membuktikan fakta tersebut. Dapatan koroner bahawa sel si mati adalah kotor dan didatangi tikus yang boleh mencemari air dalam mangkuk tandas yang telah diminum si mati untuk dijangkiti kuman leptospira, semuanya adalah sangkaan kerana tiada bukti dikemukakan dihadapan koroner dalam membuat dapatan tersebut. Adalah salah di sisi undang-undang untuk koroner membuat dapatan fakta berdasarkan spekulasi. Keputusan koroner tidak ditentukan oleh kebarangkalian tetapi oleh fakta yang telah ditetapkan. Koroner terikat dengan keterangan dan hanya dapat mencari fakta yang dibuktikan dengan keterangan, bukan tekaan (lihat perenggan 25–30 & 35).

(4) Bukti perubatan tidak dapat mengesahkan punca jangkitan leptospiral si mati dan menunjukkan beliau pasti menghidap penyakit tersebut selama kira-kira sepuluh hingga 30 hari sejak jangkitan tersebut merebak ke paru-paru dan buah pinggangnya. Maka berkemungkinan beliau dijangkiti penyakit tersebut sebelum beliau ditahan. Plaintif tidak mengemukakan sebarang keterangan untuk menolak kebarangkalian ini. Mereka juga tidak menghubungi doktor yang merawat Logeswaran dan Edward John untuk memberi keterangan bagi menunjukkan sama ada kesihatan mereka mempunyai kaitan dengan jangkitan leptospira. Tiada keterangan dikemukakan untuk menunjukkan bila masa si mati dijangkiti, sama ada air dalam mangkuk tandas sel tersebut dijangkiti dan sama ada si mati telah mengambil air tersebut. Oleh kerana tiada bukti kukuh dan bebas untuk membuktikan bahawa si mati dijangkiti jangkitan semasa beliau berada di dalam lokap, plaintif telah gagal membuktikan bahawa si mati dijangkiti penyakit tersebut semasa beliau berada di bawah jagaan defendan (lihat perenggan 31–34 & 36–37).

(5) Mengenai fakta pelik kes ini, defendan ketujuh ('D7') atau defendan

kelapan tidak boleh dipersalahkan kerana memutuskan untuk menghantar Logeswaran dan Edward John terlebih dahulu ke hospital kerana, menurut D7, keadaan mereka kelihatan lebih teruk daripada si mati. Memandangkan jangkitan leptospiral telah menjejaskan paru-paru dan buah pinggang si mati, tiada keterangan dikemukakan untuk menunjukkan berapa lama si mati sepatutnya dibawa ke hospital supaya nyawanya dapat diselamatkan. Dr Avinash merekodkan, ketika arwah tiba di hospital pada jam 8.35 malam, beliau sudah pun meninggal dunia. Ini bermakna kematian tersebut pasti berlaku antara waktu itu dan kali terakhir beliau dilihat hidup pada kira-kira 7.45 malam (semasa D7 tiba di pusat tahanan dan membawa Logeswaran dan Edward John ke hospital). Jika si mati dihantar ke hospital terlebih dahulu sebelum Logeswaran dan Edward John, mungkinkah beliau terselamat? Tiada pendapat perubatan ditawarkan kepada mahkamah ini untuk membuat penilaian termaklum mengenai isu ini (lihat perenggan 41–43 & 46–47).

(6) Mengambil kira keadaan asas yang ada pada si mati (sambungan miokardium dan aterosklerosis koronari), dan dengan ketiadaan pendapat pakar perubatan yang komprehensif, mahkamah ini tidak mungkin membuat keputusan, berdasarkan imbangan kebarangkalian, bahawa nyawa si mati boleh diselamatkan sekiranya beliau dibawa ke hospital lebih awal. Juga tiada bukti menunjukkan si mati mengadu sakit selama beberapa hari dan tidak diberikan rawatan perubatan oleh polis di pusat tahanan. Oleh itu, mahkamah tidak dapat membuat keputusan bahawa defendan telah melakukan pelanggaran kewajipan mereka terhadap si mati dan pelanggaran tersebut telah menyebabkan kematiannya (lihat perenggan 51–53).

(7) Tiada keterangan dalam kes plaintif untuk menyokong tuntutan salah guna dalam jawatan awam. Ia tidak ditunjukkan bahawa defendan telah melakukan apa-apa kesalahan yang menyalahi undang-undang; tiada keterangan niat jahat, tiada keterangan yang menunjukkan defendan telah bertindak dengan motif yang tidak wajar atau tersembunyi atau bahawa mereka telah menyembunyikan, memutarbelitkan atau memusnahkan sebarang bukti di hadapan mahkamah. Fakta bahawa si mati meninggal dunia semasa beliau berada dalam jagaan defendan dengan sendirinya tidak boleh menimbulkan tuntutan untuk salah guna dalam jawatan awam. Oleh itu, tuntutan di bawah tajuk ini adalah sama sekali tidak dapat dipertahankan (lihat perenggan 60).]

Cases referred to

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)

Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l

Thanilas, deceased) & Anor v Sjn Razali bin Budin & Ors [2022] 8 MLJ 820; [2021] MLRHU 1557, HC (refd)
Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors [2017] 9 MLJ 300; [2017] 5 CLJ 84, HC (refd)
Suzana Md Aris v DSP Ishak Hussain & Ords [2010] 6 CLJ 712, HC (refd)
Teoh Meng Kee v PP [2014] MLJU 846, CA (folld)

Legislation referred to

Civil Law Act 1956 ss 7, 8
Federal Constitution art 5(1)
Lock-Up Rules 1953
Police Act 1967
Police Regulations 1952
Security Offences (Special Measures) Act 2012

Visvanathan (with V Sanjay Nathan) (Saibullah MV Nathan & Co) for the plaintiffs.
Mohd Ashraf bin Abd Hamid (with Syhriah bt Shapiee) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Choo Kah Sing J:

INTRODUCTION

[1] The first plaintiff is the wife of the deceased Thanabalan a/l Subramaniam ('the deceased'). The first plaintiff's claim is a dependency claim pursuant to s 7 of the Civil Law Act 1956. Whereas, the second plaintiff's claim, the father-in-law of the deceased, is an estate claim pursuant to s 8 of the Civil Law Act 1956. Both plaintiffs are the administrators of the estate of the deceased.

[2] The plaintiffs' action is mounted on the fact that the deceased died under the custody of The Royal Malaysia Police in the Detention Centre of Shah Alam Police Headquarters (IPD, Shah Alam) ('the Detention Centre'). As such, the plaintiffs' action is premised on the cause of actions of tort of negligence, misfeasance in public office and vicarious liability on the part of the 13th defendant for the actions/inactions of the first to 12th defendants.

[3] The first to 11th defendants are police officers who are implicated to be responsible for the death of the deceased. The 12th defendant was the Inspector General of Police at that material time, and the 13th defendant is the

Government of Malaysia.

THE SALIENT FACTS

[4] The deceased was arrested on 29 March 2018. His arrest was under the Security Offences and Special Measures Act 2012 ('the SOSMA'). The deceased was supposed to be detained for 28 days under the SOSMA which was between 30 March 2018 and 26 April 2018. The deceased was placed at the Detention Centre in Shah Alam, Selangor, while under detention.

[5] During the detention, on 17 April 2018, around 6pm, the deceased and two other detainees, namely Logeswaran and Edward John, complained that they were not feeling well. The complaint was brought to the attention of the investigating officer ASP Mohammad Hashim bin Kasman (the eighth defendant (D8)/the fifth witness in the defendants' case (DW5)) ('D8').

[6] D8 then instructed two of his officers to attend to the complaint, namely SJN Roslan Bin Ahmad (the seventh defendant (D7)/the fourth witness in the defendants' case (DW4)) ('D7') and one constable Shahrul. D7 informed D8 that the conditions of Logeswaran and Edward John were more serious than the deceased as they looked weak. D7 also told D8 that the deceased 'masih dalam keadaan baik'. D8 then instructed D7 and constable Shahrul to first send Logeswaran and Edward John to the hospital.

[7] According to D8, there are special procedures to follow for SOSMA detainees to be sent to hospital. D7 and constable Shahrul could not send all three SOSMA detainees at the same time for security reason. D8 then instructed another officer, Corporal Zeyrul, to attend to the deceased. While Corporal Zeyrul was on his way to the Detention Centre, D8 received information that the deceased had fainted in the lock-up cell. D8 then instructed Corporal Zeyrul to immediately send the deceased to hospital once he arrived. Around 9pm, D8 was told that the deceased had passed away.

THE FINDINGS OF THIS COURT

[8] Essentially, the issues before this court are: (i) whether the defendants owed a duty of care to the deceased while under the custody of The Royal Malaysia Police in the Detention Centre; (ii) If the defendants owed a duty of care to the deceased, did the defendants breach the duty(ies); (iii) whether the breach (if any) had caused and/or contributed to the death of the deceased; and finally (iv) whether the defendants are liable to pay damages if (i), (ii) and (iii) are found to be affirmative.

Duty of care

[9] The plaintiffs' counsel has submitted at length that a duty of care was owed to the deceased by the defendants. This court has no hesitation to accept the plaintiffs' counsel's submission on this proposition of law. Our jurisprudence on this proposition of law has been well endorsed in several high-profile cases of similar nature involving the death of detainees in the custody of the police. Therefore, this court does not intend to regurgitate the law here (see *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 (CA); *Suzana Md Aris v DSP Ishak Hussain & Ords* [2010] 6 CLJ 712 (HC); *Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors* [2017] 9 MLJ 300; [2017] 5 CLJ 84 (HC); *Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l Thanilas, deceased) & Anor v Sjn Razali bin Budin & Ors* [2022] 8 MLJ 820; [2021] MLRHU 1557 (HC)).

Did the defendant breach that duty?

[10] The next question is, which is a crucial one, whether the defendants breached that duty of care? Article 5(1) of the Federal Constitution of Malaysia states: 'No person shall be deprived of his life or personal liberty save in accordance with law'. In the present case, the deceased's life and liberty was compromised because of the exercise of power by the police under the law to detain him. Hence, it is justified to say that an assumed responsibility has been imposed on the police to ensure that the deceased's well-being, including his health and safety, was not impaired while under the defendants' custody.

[11] The assumed responsibility imposed on the defendants shall include providing a decent clean environment to all the detainees under their custody. This includes providing a lock-up cell free from infectious disease like leptospirosis, a bacterial disease that is said to be a 'stressor' which caused the death of the deceased, other than his underlying problems. It is the plaintiffs' narrative that the deceased contracted the leptospiral infection while in the custody of the defendants. Hence, the defendants have breached their duty, the plaintiffs' counsel submitted.

[12] It is also a duty in law for the defendants to provide medical needs for detainees who are in their custody. It is the plaintiffs' narrative that the defendants failed to immediately attend to the deceased's need for medical attention or treatment which had led to the death of the deceased. Therefore, the defendants have breached their duty, the plaintiff's counsel submitted.

The evidence for the breach

[13] The plaintiffs called four witnesses, namely the first and second plaintiffs (PW3 and PW2 respectively), one Jothiletchumy a/p Ramiah (PW4), the former employer of the deceased, and one Dr Nur Ayutimasery bt Abdullah (PW1). Essentially, the evidence of PW2, PW3 and PW4 centres on establishing the damages claim. The liability for the plaintiffs' case is focused on the evidence of PW1. PW1 is a medical forensic expert who conducted the autopsy examination on the deceased and prepared the Post Mortem Report of the deceased (see pp 115–120 of *Ikatan Dokumen Bersama (Terpinda)*) ('the post mortem report').

The evidence of PW1

[14] An autopsy examination was carried out on the deceased at the Hospital Tengku Ampuan Rahimah, Klang on 18 April 2018 at 2pm. The post mortem report concludes as follows:

1. The body was positively identified by the deceased's younger brother as the above named person.

2. Postmortem examination showed no significant marks of injury that could have caused or contributed to his death at that moment in time.

3. Postmortem examination showed the presence of myocardial bridging involving the left anterior descending coronary artery. Myocardial bridging is a common coronary artery anomaly. It has the potential to cause significant myocardial insufficiency that may lead to fatal arrythmias and sudden cardiac death (1.2). Histological examination of the deceased's heart showed evidence of interstitial fibrosis. This is suggestive of remote ischaemia (heart muscle damage due to reduced blood and oxygen supply) that would have been a sequela to his underlying myocardial bridging.

4. There was also the presence of coronary atherosclerosis involving the left anterior descending artery. Although the degree of luminal occlusion alone would not have rendered the atheroma as a potential cause for significant myocardial insufficiency, the cumulative effect of both myocardial bridging and coronary atherosclerosis in the same coronary artery would very likely have the potential to significantly impair the myocardial perfusion.

5. Molecular analysis (PCR) of postmortem tissue samples showed the presence of leptospiral DNA in his kidney and lung tissues, a categorical evidence of leptospiral infection. The coexisting leptospiral infection would have been a significant stressor to his underlying cardiac conditions aggravating the myocardial insufficiency.

6. In view of the circumstances of his death, postmortem examination findings, absence of injury, negative postmortem toxicology and the presence of leptospiral infection, it is reasonable to conclude that his death

A at the moment in time was caused by his underlying cardiac conditions aggravated by leptospiral infection in causing myocardial insufficiency and subsequent fatal arrythmias.

CAUSE OF DEATH

B *Myocardial bridging with coronary atherosclerosis in a man with leptospiral infection*.

[15] PW1 explains in her post mortem report that the deceased died of 'fatal arrythmias', ie the heart stops beating. The cause of it is, according to PW1's finding, the combination of the underlying problem of myocardial bridging, C coronary atherosclerosis and the presence of leptospiral infection as the stressor found in the deceased's body.

[16] PW1 states in her report that 'it (myocardial bridging) has the potential to cause significant myocardial insufficiency that may lead to fatal arrythmias'. D Myocardial bridging is congenital (inborn) problem, but PW1 opined that this factor by itself, in the deceased's case, could not have caused his death.

[17] PW1 explains that the presence of coronary atherosclerosis by itself also E cannot cause the deceased's death. The presence of coronary atherosclerosis could be caused by the deceased's diet and life style, lack of exercise and aging factor, PW1 explained.

[18] In her post mortem report, PW1 states 'the cumulative effect of both F myocardial bridging and coronary atherosclerosis in the same coronary artery would very likely have the potential to significantly impair the myocardial perfusion'. The presence of both myocardial bridging and coronary atherosclerosis are not the cause of the deceased's death.

G **[19]** In her final finding, PW1 states 'it is reasonable to conclude that his death at the moment in time was caused by his underlying cardiac conditions aggravated (emphasis added) by leptospiral infection in causing myocardial insufficiency and subsequent fatal arrythmias'.

H **[20]** Leptospiral infection is caused by leptospirosis which is a bacterial disease. The bacteria are commonly found and spread through the urine of animals, particularly rodents. One of the ways in which the bacteria can pass on to humans is when humans consume water or food which is contaminated by I such bacteria. As stated earlier, it is the plaintiffs' case that the deceased contracted and suffered leptospiral infection while in the custody of the defendants.

Where and when did the deceased contract the leptospiral infection?

[21] The evidence that the plaintiffs have relied on to establish the fact that the deceased contracted leptospiral infection while in the custody of the defendants is the finding of facts by the coroner judge Puan Rofiah bt Mohamad in the inquest proceeding. A

[22] The coroner judge's finding of facts can be found in her 'Nota Prosiding' dated 21 December 2020 (endorsed on 30 December 2020) (see pp 298–300 of *Ikatan Dokumen Bersama (Terpinda)*). The coroner judge makes the following finding of facts: B

> ... Daripada keterangan yang ada saya berpuas hati dan mendapati atas imbangan kebarangkalian bahawa keadaan dan hal ehwal lokap di mana si mati ditempatkan adalah kotor dan tidak diselenggara dengan baik dari segi kebersihan ... Secara lazimnya keadaan ini sudah tentu menjemput kehadiran tikus-tikus yang membawa bakteria leptospirosis. Ini diburukkan lagi dengan ketiadaan bekalan air bersih di dalam lokap yang boleh digunakan oleh tahanan sebagai air minuman yang selamat ... Oleh yang demikian, keterangan-keterangan yang mengatakan tahanan-tahanan terpaksa mengunakan air yang mengalir dari mangkuk tandas untuk memenuhi keperluan asas kepada air minuman adalah mempunyai asas, berjustifikasi dan tidak menghairankan. Justeru, kebarangkalian adalah tinggi bahawa si mati telah dijangkiti dengan bakteria di dalam kencing tikus ini akibat beliau terpaksa menggunakan air dari mangkuk tandas sebagai minuman. Walau jika pun tidak dibuktikan si mati ini telah meminum air dari mangkuk tandas ini pun, keadaan lokap yang kotor dengan kehadiran tikus-tikus adalah satu keadaan yang boleh menjadi punca jangkitan kencing tikus yang dialami oleh si mati ... turut menyumbang kepada kegagalan untuk memastikan si mati di bawa ke hospital dengan kadar segera dan munasabah bagi memastikan si mati mendapat rawatan yang sepatut, yang mana ia mungkin dapat menyelamatkan nyawanya ... C D E F

[23] In *Teoh Meng Kee v Public Prosecutor* [2014] MLJU 846, para [48], the Court of Appeal states that there is no indictment, no prosecution, no defence and no trial in an inquest proceeding. It is simply an attempt to establish facts. 'The coroner's verdict is not determined by probabilities but by established facts. A coroner is bound by evidence and can only find facts proved by evidence, not guesswork', says the Court of Appeal. G

[24] The Court of Appeal also states that 'a coroner's inquest is merely a 'court of law', not a 'court of justice'. Its verdict does not amount to any conviction'. The Court of Appeal cited the *Practice Directions No 1 of 2007: Guidelines on Inquest*, particularly on the part of *Verdict*, wherein it states 'No verdict shall be framed in such a way to appear to determine any question of: (a) criminal liability on the part of a named person; or (b) civil liability'. H I

[25] Applying the legal principles from the Court of Appeal's decision, this court finds the finding of facts in the inquest proceeding by the coroner judge cannot be treated as facts that have been proved in the plaintiffs' case.

[26] One of the objectives in an inquest is to establish a fact. The coroner judge made a finding of fact that the lock-up cell where the deceased was detained was filthy. She then went on to make a finding of fact based on her own conjecture that the lock-up cell could have attracted rats. The coroner judge went on her own conjecture to say that rats could have contaminated the water in the urine bowl. The coroner judge then made a further finding of fact that the deceased drank the contaminated water (which is not established as a fact) from the toilet bowl. As a result, the deceased contracted the leptospiral infection which brought to the death of the deceased, the coroner judge concluded.

[27] This court is not ready to accept the plaintiffs' counsel's submission to take judicial notice of the coroner judge's findings as being proved in the plaintiffs' case. First, the coroner judge has erred in her finding that the water in the toilet bowl was contaminated by bacteria that carried the disease of leptospirosis. That finding of fact was based on her own speculation; the finding was not based on evidence. There was no evidence presented before the coroner judge that the water in the toilet bowl was contaminated by bacteria that carried the disease of leptospirosis.

[28] Secondly, the coroner judge has erred in her finding that the deceased had consumed the water from the toilet bowl. That finding of fact was again based on her own inference. During the inquest proceeding, two detainees, namely K Biranava Birabu (SI5) and Kogilan (SI14) gave their testimonies stating that there was no clean water for the detainees to consume in the lock-up cell, that fact alone cannot be taken as evidence to make a finding of fact that the deceased consumed the water from the toilet bowl.

[29] Lastly, the coroner judge states that 'walau jika pun tidak dibuktikan si mati ini telah meminum air dari mangkuk tandas ini pun, keadaan lokap yang kotor dengan kehadiran tikus-tikus adalah satu keadaan yang boleh menjadi punca jangkitan kencing tikus yang dialami oleh si mati'. The coroner judge made a finding of fact that because of the filthy conditions in the lock-up cell, it had attracted the presence of rats in the lock-up cell, and the rats' urine had caused the deceased to contract the disease. This finding of fact is purely speculation. It is wrong in law for a coroner judge in an inquest proceeding to make finding of fact based on speculation. There was not an iota of evidence presented before the coroner judge that the lock-up cell was infested with rats bearing the bacteria that would cause leptospirosis disease.

[30] This court is perturbed with the above erroneous findings of facts by the coroner judge. This court reiterates the decision of the Court of Appeal in *Teoh Meng Kee* which states that 'the coroner's verdict is not determined by probabilities but by established facts. A coroner is bound by evidence and can

only find facts proved by evidence, not guesswork'. A

[31] PW1 explains that the deceased's leptospiral infection was in the second phrase (as it had infected the deceased's lung and especially the kidney). PW1 further explains that the deceased could have been infected by the bacteria for around ten to 30 days. B

[32] The deceased was arrested on 29 March 2018. The deceased complained feeling unwell on 17 April 2018. It is on the 20th day of his arrest that the deceased complained sick. In other words, there is a probability that the deceased could have been infected by the disease before his arrest on 29 March 2018. This probability has not been ruled out by any probative evidence in the plaintiffs' case. During cross-examination, PW1 told the court that she could not confirm the source from which that the deceased had contracted the leptospiral infection. C D

[33] This court observes that it was stated in the Medical Report of 17 April 2018 that he was diagnosed with 'Upper Respiratory Tract Infection'. In the Medical Report of detainee Logeswaran who also received treatment on 17 April 2018, it was stated that he was diagnosed with 'Acute gastroenteritis'. Both Edward John and Logeswaran were attended to by the same doctor Mohamad Falah bin Abu Bakar. Both detainees had fever, which is a symptom commonly found in a patient who contracts leptospiral infection. The plaintiffs' counsel did not call the doctor to give evidence in this court proceeding as to whether the sickness of the two detainees could have any relation to leptospiral infection. E F

[34] The entire plaintiffs' narrative is not supported by any cogent or independent evidence that the deceased contracted leptospiral infection in the lock-up cell, other than relying on the coroner judge's erroneous finding of facts. The plaintiffs' counsel urges this court to take judicial notice of the coroner judge's report as if those facts have already been established and proved in the plaintiffs' action. This court is of the considered view that the approach adopted by the plaintiffs' counsel is misconceived in law. G H

[35] It is trite that he who asserts a fact must bear the burden of proof. Therefore, the plaintiffs are required to prove those facts alleged on a used only as a basis to launch a criminal or civil suit. The finding of facts in a coroner's report cannot be treated as facts that have already been proven without calling any witness to prove those facts. An inquest proceeding is not a trial. The plaintiffs' counsel ought to have considered calling (or by subpoena) persons who were detained at the same time as the deceased such as Logeswaran, Edward John, K Biranava Birabu or Kogilan, or any other detainee to give evidence to support the plaintiffs' narrative. I

[36] This court, after having combed through the evidence, finds there is no probative evidence to make the following finding of facts: (i) the time the deceased contracted the leptospiral infection; as the deceased could have had contracted the disease before or after his arrest; (ii) that the lock-up cell or the water in the toilet bowl was contaminated with infectious diseases like leptospirosis; and (iii) that the deceased consumed the water from the toilet bowl which was contaminated with bacteria that had caused the deceased to suffer from leptospiral infection.

[37] As such, this court is not satisfied that the plaintiffs have proved, on a balance of probabilities, that the defendants are to blame for the deceased having contracted leptospiral infection while in the defendants'

Whether the deceased's life could have been saved if not for the delay?

[38] Notwithstanding the above and regardless where and when the deceased contracted the leptospiral infection, it is still a fact that the deceased was suffering leptospiral infection while at the Detention Centre. It is the plaintiffs' case that the defendants failed to immediately attend to the deceased's need for medical attention, as a result, the deceased died. It is then incumbent upon this court to ask whether the deceased's life could have been saved if not for the decision taken to send the deceased to hospital only after Logeswaran and Edward John had been sent to hospital. In other words, would it have made a difference if the deceased was sent to the hospital before Logeswaran or Edward John?

[39] It is an admitted fact that there was lack of manpower to handle SOSMA detainees on that day. Could the lack of manpower be the cause of the death of the deceased? There is no evidence to suggest that the way the police dealt with the three detainees complaining ill at the same time due to lack of manpower was a common problem that the police have repeatedly failed to address. The Royal Malaysia Police force can be shorthanded at times, but that deficit cannot be used by itself as leverage police are unable to immediately attend to something when called upon to do so. The mere delay in taking action cannot be construed as an immediate breach of a duty. Whether delayed action can tantamount to a breach of duty has to be considered on a case-to-case basis, and it depends on the peculiarity of the facts before the court.

[40] In the present case, three SOSMA detainees complained at the same time that they were not feeling well. As such, the situation indeed places the investigating officer D8 in a tight situation. For SOSMA detainees, only designated police officers and certain number of police officers are allowed to escort SOSMA detainees to the hospital. D8 instructed D7 and constable

Shahrul to attend to the situation. D8 told the court that at first there was only two detainees who complained they were not feeling well. When the police officers arrived, they were told there were three detainees complaining of not feeling well. In that given situation, only two detainees could be escorted to the hospital as there were only two officers who were deployed to attend to the situation.

[41] D7 (or DW4) told the court that he assessed the situation and believed that Logeswaran and Edward John were in more serious condition than the deceased. According to D7, he said the deceased told the situation, D7 had to make a decision. D7 related the situation to D8 and obtained approval from D8 to first send Logeswaran and Edward John to the hospital. Although D7 has no medical training background, given the situation, he was not spared from making an immediate decision, ie, who should be sent to the hospital first. D7 told the court that the deceased told him that he could wait for his turn. Perhaps for that reason, it confirmed D7's observation that Logeswaran and Edward John were more serious, and they needed to be sent to the hospital first. This court is of the considered view that given the peculiarity of the facts in this case, neither D7 nor D8 could not be faulted for making a decision to send the deceased to the hospital only after D7 had sent Logeswaran and Edward John to hospital.

Would it have made a difference?

[42] The next critical question is: In the event the deceased was sent to the hospital first, would the deceased still be alive today? The doctor who attended the deceased was Avinash a/l Chandrasekharan Pillay. He was not called to give evidence. Based on his police report SEK 9/004445/18 dated 17 April 2018 (see p 23, *Ikatan Dokumen Bersama (Terpinda)*), the deceased was no longer alive when he arrived at the hospital. He the death of the deceased at 9.05pm on 17 April 2018. The cause of death is stated as 'punca kematian tidak ketahui'. The plaintiffs' counsel could have called Dr Avinash a/l Chandrasekharan Pillay as a witness to shed some light on the condition and appearance of the deceased's body when the deceased was brought into the hospital. There is no medical opinion from Dr Avinash a/l Chandrasekharan Pillay to say the deceased's life could have been saved if he was admitted earlier to the hospital.

[43] Based on the medical opinion of PW1, she told the court that patient who suffers from leptospiral infection can be treated. However, there is no affirmative medical expert opinion from PW1 to suggest that in the deceased's case his life could have been save if he was admitted earlier to the hospital.

[44] This court disagrees with the plaintiff's counsel's submission that PW1 has given a positive answer to the question asked whether the deceased's life could have been saved. PW1's answer is recorded as follows:

> Q: So Dr, ya, seorang yang mempunyai jangkitan leptospira, ya, adakah ianya satu keadaan yang mana boleh diselamatkan sekiranya diberikan rawatan yang sewajarnya di hospital ataupun medical treatment lah, ya, bagi keadaan ini?
>
> A: Boleh, Yang Arif. Seperti yang saya katakan tadi, leptospira ini dia mempunyai spektrum daripada yang paling mild sehingga yang paling teruk. Maksud saya di sini, seseorang itu akan menunjukkan tanda-tanda sakit. Mungkin penyakit itu akan overlap dengan penyakit lain, tetapi jika beliau dibawa ke hospital, saya pasti doktor yang merawat akan melakukan ujian dan salah satunya mereka mungkin akan mencari sebab fever. Selalunya, seseorang itu akan mempunyai fever lah, yang paling mild adalah fever. Jadi, doktor akan mencari punca fever tersebut. Selalunya denggi dan leptospira adalah salah satu ujian yang kita di hospital akan selalu ambil untuk menentukan sebab fever tersebut, demam tersebut, Yang Arif.

[45] PW1 gave a general answer as to how a doctor would attend to a patient when admitted to hospital. Medical tests would be carried out to determine the cause of illness. As PW1 said, there is a spectrum of severity of a leptospiral infection which ranges from mild to very serious. PW1 did not explicitly give her opinion to this court that based on the deceased's condition before he died, if he had reached the hospital earlier, the deceased's leptospiral infection could have been diagnosed on time to save his life.

[46] It is in evidence that PW1 said the deceased was suffering from second phase of the infection which was considered as serious because the bacteria already infected the deceased's kidney. The plaintiffs' counsel did not elicit from PW1 as to how much time a doctor would need to examine a patient to diagnose that the patient was suffering from leptospiral infection so that proper medication could be administered. This is a material medical opinion, because if the time to diagnose a patient suffering from leptospiral infection will take several hours or more, then it would not have made a difference whether the deceased was sent earlier to the hospital.

[47] The time the deceased reached the hospital was 8.35pm on 17 April 2018 (according to the police report of Dr Avinash a/l Chandrasekharan Pillay dated 17 April 2018). The deceased was not alive when brought to the hospital. That means the deceased could have died between the hours after 7.45pm (when D7 reached the Detention Centre and took Logeswaran and Edward John to the hospital) and before 8.35pm. There was approximately less than an hour in between the time the deceased was last seen still alive and the time the deceased reached the hospital. If the deceased was sent first to the hospital, in that short span of less than an hour, would the doctor in the hospital have been able to diagnose the deceased was suffering from leptospiral infection, in

addition to diagnosing the underlying problems of the deceased. There is no medical opinion offered to this court to make an informed assessment of the probability of the likelihood that the deceased could have survived if he was sent the hospital earlier, ie before instead of after Logeswaran and Edward John were sent to hospital.

[48] Further, one important fact is that it is not established in evidence that the police knew of the underlying conditions (myocardial bridging and coronary atherosclerosis) of the deceased. Therefore, the answer PW1 gave is not conclusive that the deceased with such underlying condition could have been saved in the given situation.

[49] A medical expert's opinion is crucial for this court to make a finding in relation to the chances for the deceased's life to be saved. PW1's evidence is confined to the cause of death of the deceased; she was not called to give medical expert opinion whether the deceased's life could or could not have been saved in the given situation.

[50] In the event the plaintiffs' counsel's intention was to call PW1 as a medical expert to give her medical opinion on the chances the deceased's life could have been saved in the given situation, then this court finds PW1's opinion is insufficient to allow this court to make an assessment based on her opinion.

[51] In conclusion, taking into account the underlying condition (myocardial bridging and coronary atherosclerosis) of the deceased, and in the absence of a comprehensive medical expert opinion, it is not possible for this court to make a finding, based on balance of probabilities, that the deceased's life could have been saved if he had been brought to the hospital earlier. There is also no evidence whatsoever to suggest that the deceased had complained ill for several days, and that he was not given medical attention by the police in the Detention Centre.

[52] Based on the above evaluation, this court is unable to make a finding of fact that the deceased's life could have been saved if he was brought to the hospital earlier by the police.

[53] In conclusion, based on the evidence before this court, this court cannot make any finding that the defendants have committed a breach of their duty owed to the deceased and that such breach had caused the death of the deceased.

Other considerations

[54] The plaintiffs' counsel submits that the second defendant (DW1), seventh defendant (D7/DW4), eighth defendant (D8/DW5), first defendant (DW6), fourth defendant (DW8) have respectively breached various provisions of the Lock-Up Rules 1953, Police Act 1967 and Police Regulations 1952. This court is of the considered view that evidence of those breaches, such as failure to perform checking at the lock-up cell every half an hour and failure to record on the station diary, do not establish a causal link between the breach and the actual cause of death of the deceased.

[55] This court is of the considered view that all the breaches will only become relevant if the plaintiffs' case is that before the deceased died on 17 April 2018, he had complained of not feeling well for many hours or days before his death, but was not attended to. However, that is not the plaintiffs' case, and there is no evidence adduced before this court.

[56] The plaintiffs' counsel submits that there was no medical check-up performed on the deceased when he was arrested. This court is of the considered view that there is no evidence to suggest that if a medical check-up was carried out on the deceased upon his arrest, this would have definitely revealed the underlying condition of the deceased or that he had leptospiral infection.

Summary — No breach of duty

[57] Based on the above findings, this court answers the issues to be tried as follows: (i) the defendants did owe a duty of care to the deceased; (ii) the defendants did not breach their duty(ies) of care in the given situation as the plaintiffs failed to prove: (a) the deceased contracted leptospiral infection in the Detention Centre; and (b) the deceased's life could have been saved if he had been sent to the hospital earlier; (iii) therefore, the causal link between any breach and the deceased's death is not established in that his death was caused by the defendants' actions or inactions or the breach of the statutory requirements.

[58] Flowing from the above, therefore, this court finds that the defendants are not liable to pay damages for the plaintiffs' dependency and estate claims under the cause of action of tort of negligence.

The claim of misfeasance in public office

[59] In *Datuk Seri Khalid bin Abu Bakar & Ors*, the Court of Appeal at para [33] of its judgment states as follows:

To sustain a claim of public misfeasance, what the plaintiff is required to prove is as set out in the case of *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220 which are as follows:

(i) The act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power;

(ii) The act committed must be done with malice which Lord Steyn in *Three Rivers* explained as follows:

First there is the case of targeted malice by a public officer, ie, conduct specially intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is unlawful;

(iii) That there is proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and

(iv) That the acts of the defendants had caused material damage to the deceased.

[60] In the present case, there is not a shred of evidence in the plaintiffs' case to support a claim of misfeasance of public office in that the defendants had committed any illegal wrong doing. No evidence of malice is presented before this court. There is no evidence to suggest the defendants have acted with an improper or ulterior motive or that they have no power to do the act complained of and that such act injured the plaintiffs. The plaintiffs did not show any evidence that the defendants have concealed, distorted or destroyed any evidence before this court. The mere fact that the deceased died in the custody of the defendants, that itself cannot immediately give rise to a claim of public misfeasance. Hence, the plaintiffs' claim under this head is totally unsustainable.

CONCLUSION

[61] This court, after having sieved through the evidence, is not satisfied that the plaintiffs have discharged their burden of proof on a balance of probabilities that the defendants had breached their duty in tort of negligence or that the breach could have led to the death of the deceased. The causal link between the actions and/or inactions of the respective defendants and the death of the deceased is not proved in the plaintiff's case. This court also finds the claim of misfeasance in public office against the defendants is not proved on the balance of probabilities. Hence, the entire plaintiffs' claim is dismissed. This court orders no costs to be paid by either party.

A *Plaintiff's claim dismissed.*

Reported by Ashok Kumar

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